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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. EDDIE S. SIMPSON, Defendant and Appellant.	B289434 (Los Angeles County Super. Ct. No. MA071762)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa M. Chung, Judge. Affirmed and remanded.

Lillian Hamrick, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

Defendant Eddie S. Simpson appeals following his jury conviction of attempted robbery of the first degree (Pen. Code, §§ 211 & 664).[1] Defendant admitted a prior residential burglary conviction. The court sentenced defendant to nine years in prison, a term that included a then-mandatory five-year enhancement for the prior serious felony conviction. (§ 667, former subd. (a)(1); § 1385, former subd. (b).)

On appeal, defendant contends the evidence was insufficient to show specific intent to commit robbery. He also contends the trial court erred in failing to instruct the jury, sua sponte, on the lesser included offense of attempted theft. And, in supplemental briefing, defendant contends legislation that went into effect on January 1, 2019, ending the statutory prohibition on a trial court's ability to strike a prior serious felony enhancement, applies and requires a remand for a new sentencing hearing.

We find the evidence is sufficient to support the conviction and the trial court had no duty to instruct on attempted theft. Accordingly, we affirm the judgment, but we agree that remand is required for the exercise of the trial court's discretion to decide whether to strike the prior serious felony enhancement under the new legislation.

FACTS

1. The Attempted Robbery

At about one o'clock in the morning on July 24, 2017, Jamila Washington was in the den area of the home she rented in Lancaster. Her daughter, then nine years old, was in Ms. Washington's bedroom, watching a movie. Ms. Washington

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[1] Further statutory references are to the Penal Code.

heard the doorbell, went to the door, and asked, "who is it?" She did not hear anyone, and opened the door. No one was there. She closed the door and moved to the bathroom adjacent to her bedroom. Then she heard "banging on the window sill" of the bathroom. The banging was loud, and she "screamed out, 'who is it?' " She "heard a guy's voice."

According to Ms. Washington, "Once I looked out the window and I seen him, I was, like, 'who are you?' [¶] And then he told me that his name is Eddie. [¶] And I was, like, 'what do you want?' [¶] And he said that he was the security and they sent him. And I told him that I didn't know him and if he don't leave, I'm going to call the police. And he said okay and he sat on porch, the front door porch." (During the time Ms. Washington lived in the home, the landlord had never sent a security guard to the home.)

Ms. Washington went to the den area, "grabbed [her] phone and called 911." The operator asked if the man was "still out there." Ms. Washington looked out the window and he was still there, wearing a gray sweatshirt, a black beanie and black pants. As she watched, the man got up and walked away. He was walking slowly, looking at the window where Ms. Washington was standing. She thought he looked angry, and his eyes were big. Ms. Washington felt "scared because I didn't know who he was and what he wanted. I was scared and nervous."

Ms. Washington's daughter was at the bathroom window with her mother. She had heard someone say "Hey," while she was watching the movie, and went to tell her mother. She heard the man say, " 'This is Eddie,' " and she heard him say, " 'Somebody sent me as a security guard' " when her mother asked him what he wanted.

The police came that night, but "[t]hey didn't find him."

Later that same day, in the afternoon, Ms. Washington was at home studying. She "didn't go to work that day because I was scared, and I did not know if he was going to come back the night, and I didn't want him to be in my home when I came back from work so I didn't go to work. I stayed home."

At about 3:00 p.m., the doorbell rang, and again no one was there. Ms. Washington went back to what she was doing, and then, "I don't know how many minutes later, my daughter screamed." Her daughter had heard the doorbell ring, and saw someone ("a shadow") pass her bedroom window. "[S]he screamed, 'Mama, he's in the back yard.' " Ms. Washington called 911.

Then Ms. Washington "went . . . to the living room window and looked, liked peeked." At first she did not see anyone, but "then I seen him at the [kitchen] window trying to open it or whatever. I don't know. He was at the window trying to, like, get – I don't know what he was doing, but to me it seemed like he was trying to get in the window." "I heard him [tugging] on the screen or, you know, trying to – it felt to me like he was trying to get into that window." It appeared to her that the man was attempting to remove the screen. Ms. Washington's daughter also saw that "[s]omebody was trying to open the kitchen window and come in." "[H]e was like pulling, pulling the window, trying to open it."

Ms. Washington "screamed and said, 'Get away from the window and get out of my yard,' or whatever. [¶] And he – he was, like, 'open the door.' And he walked off." When the man said, "Open the door," "[h]e screamed it," in a loud, angry tone. Ms. Washington recognized the man at the window "because he was there at 1:00 a.m. So I know that he was the same guy." While this was happening, Ms. Washington "felt fear for me and

my daughter because we was home alone." Her daughter was scared, and it seemed to her that her mother was also scared.

Ms. Washington then ran to her bedroom. From the bedroom window, she saw "a lot of sheriffs in the front yard and the street, and I seen that they had got him." Ms. Washington identified defendant as the man she saw that day. She had never seen him before.

Deputy Sheriff Chantelle Telles arrived at the scene at about 3:15 p.m. Other officers had already pinned defendant to the ground in the driveway. Deputy Telles "was immediately contacted by [Ms. Washington]," who ran outside, was "a bit frazzled," and said, "That's him. That's him." Ms. Washington "was scared. She was . . . very upset. She was kind of jumping all over the place, and she was just very nervous." Deputy Telles spoke with Ms. Washington's daughter also, who "was pretty shocked."

After talking with Ms. Washington in the porch area, Deputy Telles turned her attention to "property left on the porch that was taken from the suspect." There was a black backpack, closed, with items inside. Officer Telles's partner searched through the black bag in her presence. There were "papers, all sorts of like – there was a gold lock that we had taken out and [Ms. Washington] had immediately recognized, 'Hey, that's my lock,' as we're going through all these items. [¶] And then my partner pulls out a handgun, what appeared to look like a handgun at the time." When she saw it, Ms. Washington "asked the sheriff, 'Is that a gun?' Like, 'Is that a 9-millimeter?' "

After further investigation, Deputy Telles determined the item that appeared to be a handgun was a replica. According to Deputy Telles, there is typically an orange tip on an imitation firearm, but the one in the backpack had none. By just looking at

the replica without inspecting it, it was "most definitely" reasonable "that it would appear to look like a real firearm."

Other items found in the black bag were a dark blue hooded sweater, a black beanie, two gloves, and a bandana.

Deputy Telles inspected the kitchen window, and found no signs of forced entry. She saw "footprints in the dirt that was directly in front of the window." She took a photograph of a side gate, "the only gate that leads to and from the back yard." The photograph showed "a hole where [Ms. Washington] would normally secure her gold lock to the door." (Ms. Washington later testified she had the gold lock on that gate, but it "wasn't locked completely. I didn't close it down, but it appeared, like, if you looked at it, you thought it could be locked, but it wasn't. I didn't click it down."

Deputy Telles searched defendant. She found on his person a document indicating "notice to enter." "It was a bit crumpled . . . like somebody would find a piece of paper and kind of put it away in their pocket or pants." She showed it to Ms. Washington. Ms. Washington recognized the form, a "Notice of Intent to Enter" (concerning repairs). She later testified that the landlord "had put one on the door in . . . early June." The date of entrance on the form was June 12, 2017. Ms. Washington had taken the form inside the house, and she threw it away after the repairs were completed in June.

Defendant was "extremely nervous and fidgety" and "sweating profusely." Deputy Telles "wasn't really able to make out a lot of what he was saying," and she was unable to perform any field sobriety tests because defendant "was uncooperative at the time and, again, very nervous, very fidgety." It appeared to Deputy Telles that defendant was under the influence of methamphetamine. As she was taking defendant to her patrol car, he yelled out, " 'Well, this is my Mom's house.' "

Deputy Telles took defendant to a hospital for medical evaluation. There, his demeanor changed and he was "more relaxed," "more cooperative," and "began to talk to us." He said "that was his mother's house," and he gave Deputy Telles his mother's name (Lawanda Simpson) and phone number.

On the day of the incident, Ms. Washington sent a text to her landlord, Ms. Simpson. She asked Ms. Simpson, "do you know somebody named Eddie?" Ms. Washington's text was "just explaining to her what was going on because I didn't know who he was and . . . I just figured it is her house, she had should [*sic*] know, like, who it is." When she saw defendant during these incidents, "I was thinking I didn't know if he was on drugs or if he had mental issues."

2. The Trial

Defendant was charged by information with attempted first degree residential robbery (a felony), and with unlawful alteration of an imitation firearm (a misdemeanor). The information also alleged defendant's prior conviction of residential burglary as a strike prior, a serious felony prior, and a prison prior.

In addition to the facts we have related, evidence adduced at trial included the following.

Lawanda Simpson testified she is defendant's mother, and owned the house Ms. Washington and her daughter occupied. She kept a set of keys to the rented house in an unlocked drawer in a bedroom of her home. On June 8, 2017, she asked defendant to deliver the "notice of intent to enter" form to Ms. Washington's home. She forgot to ask him if he had done so. The repairs were performed the following Tuesday. Defendant never worked as a handyman for Ms. Simpson's rental property, and she had no reason to send him there in July. Defendant lived with Ms. Simpson, and they had a "close relationship." Their home

was "relatively close" to Ms. Washington's home, "about 20, 30 minutes walking."

Ms. Simpson received a message from Ms. Washington in the afternoon of July 24, 2017. She found out her son had been arrested on that day, while she was at work. She did not remember having a phone conversation with him while he was in custody. His arrest was "very upsetting."

At some point, Ms. Simpson had conversations with defendant about what happened that day. She asked him why he was at Ms. Washington's home, and "[h]e said someone was chasing him." Ms. Simpson testified that defendant did not tell her that he asked for help when he went to Ms. Washington's home, and he did not tell her that he asked to be let in because he was scared.

During Ms. Simpson's testimony, the prosecutor played a recording of a telephone call defendant made to his mother on July 25, 2017 (the day after his arrest). On the telephone call, Ms. Simpson asked him why he went to the rental property at 1:30 in the morning, and he said that someone was chasing him. Ms. Simpson asked him why he went back at 3:00 in the afternoon, and he said, "Because I was going to the apartments and I seen the same people that chased me the day before; and I ran back over there," because "I didn't have nowhere else to run," and "I thought you was going to be there." Defendant said, "I was scared. I just went into the backyard. I didn't want nobody to get me. So I felt, I felt that was yours, and I was running from the, from the people that was chasing me. So I ran over there." Defendant said that "I felt it was the safest spot to run." Defendant said he "knocked on the door and I told her it was me. I'm like, I'm like, like . . . yo, let me in." "I was like, 'Hey, open the door. Let me in. I'm scared.' " Defendant asked his mother to tell Ms. Washington that "they was chasing me and that's why

I was over there," and to ask Ms. Washington "to come to court on his behalf." Then defendant told his mother that he was "going to work"; he "was running. I had to be at work at 3 in the morning." He said, "I was gonna hop on the 6 o'clock train. . . . [T]hat's why I was walking through the neighborhood. I was going to the freakin' train station, Mama."

3. The Verdict and Sentence

The jury found defendant guilty of attempted robbery in the first degree, and not guilty of unlawful alteration of an imitation firearm.

On April 13, 2018, defendant waived his right to a court trial and admitted his prior conviction of residential burglary, both under the "Three Strikes" law and under the serious felony enhancement statute (§ 667, subd. (a)(1)).

The court then heard defendant's oral *Romero* motion to strike the residential burglary conviction.[2] The court observed the motion "would only apply to [the conviction's] enhancement as a strike prior."

The court ultimately denied the *Romero* motion, stating: "I do acknowledge as part mitigation that, as he stands here, he is currently young, 27 years old. [¶] The particular facts as it came out at the jury trial . . . were somewhat unusual. They were not typical. The home at issue was his mother's rental home. Nevertheless, in balancing certain aggravating factors, the two occasions, the late hours of the evening, the victim along with her young minor daughter, the court found a particular vulnerability there. It was clearly a very frightening experience for them. [¶] I have also taken into consideration [defendant's] prior criminal history." After noting other offenses for which

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[2] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

defendant was placed on probation and a recent DUI, the court observed the strike prior had a gang allegation attached to it, "clearly a serious offense." The court stated: "[B]alancing both the aggravating, mitigating circumstances, considerations of public safety, [the court] would decline to exercise its discretion to strike his strike prior."

After a further exchange with defense counsel, the court stated: "[Defendant's] previous criminal record, which, although minor, as I mentioned with the drug-related offenses and the D.U.I., we have a pattern of increasing serious conduct. So my decision would still stand in terms of not exercising the discretion."

The court then explained its tentative sentence. "Similar to the balancing, I am not going to be using [defendant's] strike prior, the one with the gang allegation, since that's separate, going to be a separate enhancement[,] in terms of trying to select which term. [¶] Arguably he's got, separate from that, previous grants of probation that he's clearly been unsuccessful. We've got crimes of increasing seriousness. The court does not find him to be a suitable candidate for probation. However, the court finds there is also, as noted, with his young age, somewhat unusual set of facts, that the aggravating factors don't outweigh the mitigating. And then my indicated would be for the mid term, with the understanding, of course, that the enhancement would occur for the strike, along with the 667(a)(1), which I have no discretion to strike, which would be a consecutive five years."

After hearing argument from defense counsel for the low term, the court stated that "the low term mitigation doesn't outweigh the aggravating nature and [the court] believes that the mid term is the appropriate sentence."

The court sentenced defendant to nine years (the midterm of two years, doubled for the strike (§§ 667, subds. (b)-(i) &

1170.12), plus the five-year enhancement for his prior serious felony conviction (§ 667, former subd. (a)(1))). The court also awarded custody and conduct credits and made further orders not at issue on this appeal, observing that "I am going to, despite the sentence, give [defendant] the lowest minimum court fines." The court, on the prosecutor's motion, dismissed the prison prior allegation under section 1385.

DISCUSSION

1. Evidence of Specific Intent to Commit Robbery

The principles governing judicial review of a claim of insufficient evidence have been repeated many times.

" ' "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a *reasonable trier of fact* could find the defendant guilty beyond a reasonable doubt." ' " (*People v. Ghobrial* (2018) 5 Cal.5th 250, 277 (*Ghobrial*.) "The standard is the same under the state and federal due process clauses." (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 294.) "We presume ' "in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citation.] This standard applies whether direct or circumstantial evidence is involved.' " (*People v. Prince* (2007) 40 Cal.4th 1179, 1251.) "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." (*Ghobrial, supra,* 5 Cal.5th at p. 278, quotations omitted.)

Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) An attempted robbery " 'requires a

specific intent to commit robbery and a direct, ineffectual act (beyond mere preparation) toward its commission.' " (*People v. Lindberg* (2008) 45 Cal.4th 1, 24.)

Defendant challenges the specific intent element of attempted robbery. He contends it is unreasonable to infer from the evidence we have related that defendant intended to rob Ms. Washington. Instead, he says, the evidence shows he unwisely chose "to go to his mother's rental house while under the influence in an effort to evade real or imaginary enemies." That conclusion, however, would require this court to believe what defendant told his mother, and ignore the evidence supporting a different conclusion – precisely what an appellate court may not do.

The substance of defendant's claim is that the evidence in this record "contains none of the typical indicia of specific intent." Defendant points out he did not demand money, he did not point a gun at the victim, he did not have a motive to commit a robbery, and he did not attempt to enter the house "stealthily." He contrasts his own conduct as "actions that are so ambiguous as to preclude any reasonable inference of a specific intent to steal." We do not agree. We are offered no precedent suggesting that the factors defendant cites constitute the universe of circumstances permitting an inference of intent to rob. Plainly they do not. (Cf. *People v. Solis* (2001) 90 Cal.App.4th 1002, 1010 ["The particular evidence offered to prove the charge must, by necessity, vary from case to case."].)

Of course, defendant is correct when he says that evidence that merely raises a strong suspicion is not sufficient, and that the trier of fact must be reasonably persuaded to a near certainty, and must have reasonably rejected " ' " 'all that undermines confidence.' " ' " (*In re Roderick P.* (1972) 7 Cal.3d 801, 809.) Those principles are applicable in this case as in every

case. But we see nothing here that "should have undermined the jury's confidence" that defendant intended to rob Ms. Washington.

Defendant repeatedly asserts the evidence merely showed "a demand for shelter" rather than an intent to rob. Thus, defendant says, rattling the windows, demanding to be let in, "appear[ing] to be trying to pry open a window," and falsely stating he was a security guard "do not evidence any specific goal other than wanting Washington to shelter him." The jury's inferences to the contrary were reasonable and supported by the evidence.

The jury plainly did not believe the claim that defendant tried to get into the house because someone was chasing him and he was frightened. He said nothing of the sort to Ms. Washington, and instead falsely asserted he was a security guard. Moreover, it defies credulity to suggest that someone who is being chased – and "[t]rying to enlist Washington's help in his flight from people he thought were going to hurt him" – would, after failing to gain entry, sit on the front porch and then slowly walk away.

In short, the jury was entitled to draw the inference that defendant had the specific intent to rob. We will not repeat the evidence we have already described in detail. Defendant tried to gain entry on two different occasions, banging on the bathroom window sill and trying to open the kitchen window. The reasons offered for doing so may reasonably be viewed as incredible. Defendant had already taken property belonging to Ms. Washington – the gold lock on the side gate, found in his backpack. His backpack also contained gloves and an imitation firearm that looked like the real thing. While none of these facts standing alone is decisive, facts do not stand alone. Viewed as a whole, the circumstances reasonably justify the jury's inference

that defendant intended to rob Ms. Washington. (Cf. *People v. Vizcarra* (1980) 110 Cal.App.3d 858, 862, 863 [approaching a liquor store with a rifle and attempting to hide when observed by a customer was a sufficient direct act toward the accomplishment of the robbery; "[k]nowing that an attempt to steal may be proved by inference from all of the circumstances of the case, [the defendant] has not attempted to argue a lack of intent to commit robbery"]; *People v. Gilbert* (1927) 86 Cal.App. 8, 9 ["an intention to commit the crime of burglary might reasonably be inferred" from the overt act of climbing over a balcony and approaching the doors leading to a bedroom, then dropping from the balcony to escape when the occupants were aroused].)

One final note: Ms. Washington, when asked how she felt when the police did not find defendant after the 1:00 a.m. incident, testified that "I was scared because I didn't know who he was and what he wanted." Relying on this testimony, defendant repeatedly asserts that if the victim did not know his intent, neither could the jury. That is patently wrong, ignoring all the surrounding circumstances that were unknown to Ms. Washington at the time. Defendant's claim of insufficient evidence has no merit.

2. The Lesser Included Offense Claim

Attempted theft is a lesser included offense of attempted robbery. (*People v. Reeves* (2001) 91 Cal.App.4th 14, 53.) "[R]obbery has the additional element of a taking by force or fear." (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351.) "The trial court has a duty to instruct the jury sua sponte on all lesser included offenses if there is substantial evidence from which a jury can reasonably conclude the defendant committed the lesser, uncharged offense, but not the greater." (*People v. Brothers* (2015) 236 Cal.App.4th 24, 29 (*Brothers*).)

"Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8; see *People v. Breverman* (1998) 19 Cal.4th 142, 162 ["the existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense"].)

"We review the trial court's failure to instruct on a lesser included offense de novo [citations] considering the evidence in the light most favorable to the defendant [citations]." (*Brothers, supra,* 236 Cal.App.4th at p. 30.)

Defendant contends there was "substantial evidence on which to base a finding that [defendant's] actions did not rise to the level of 'force or fear.' " We disagree.

The fear element of robbery includes "fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family." (§ 212.) Defendant does not actually cite any evidence to show that his actions may not have been sufficient to produce fear in the victim. Instead, he cites other cases with other facts, such as a case finding the fear element was satisfied "when there is sufficient fear to cause the victim to comply with the unlawful demand for his property." (*People v. Ramos* (1980) 106 Cal.App.3d 591, 601-602, disapproved on other grounds in *People v. Scott* (1994) 9 Cal.4th 331, 353, fn. 16.) Defendant points out that Ms. Washington "was not asked to part with any property," and "although [defendant] frightened her, he did not do anything to frighten her enough to make her even consider letting him in, much less let him in to rob her." This is a meritless claim on its face.[3]

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[3] In other words, the assertedly substantial evidence supporting an attempted theft instruction is that "nothing about [defendant's] actions caused [Ms. Washington] to even consider

Ms. Washington was "frighten[ed] . . . enough" by defendant's attempts to enter her home to call for emergency police assistance, and "frighten[ed] . . . enough" to stay home from work after the first incident because she was afraid he would return and "be in my home when I came back from work."

Defendant's reliance on *People v. Brew* (1991) 2 Cal.App.4th 99 as "instructive" gets him nowhere. There, when the defendant " 'came inside' " the cash register area at a Thrifty drug store, the cashier, "[s]cared, . . . moved away from the register" and defendant then took money and other items from underneath the open cash register drawer. (*Id.* at p. 103.) The defendant said nothing to the cashier and did not touch her. (*Ibid.*) In those circumstances, the court found the evidence was sufficient to sustain a finding the offense against the cashier was committed through use of fear or intimidation, but that it arguably would support the lack of those elements, because the fact the cashier was "scared" might have been from " 'the shock of somebody reaching and making an unexpected movement toward the cash register drawer.' " (*Id.* at p. 105.) We fail to see any similarity rendering the case "instructive" in the circumstances of this case, where "fear of an unlawful injury to the person or property" (§ 212) is readily apparent.

In short, no reasonable jury could conclude, on the evidence in this case, that the fear element was not met. Accordingly, the court was not required to instruct on attempted theft.

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letting him in the house, an indication that the level of force or fear he exerted in his demands, the way he shook her window, and his apparent effort to pry open a window was not the sort of fear or force that would accomplish a robbery." The contention is plainly untenable.

3. The Five-year Enhancement

As mentioned at the outset, defendant's nine-year sentence included a mandatory enhancement of five years for his prior serious felony conviction. At the time of defendant's sentencing (on April 13, 2018), section 1385, subdivision (b) specified that section 1385 "does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (§ 1385, former subd. (b).)

Effective January 1, 2019, as a result of the enactment of Senate Bill No. 1393, the prohibition against striking a prior serious felony enhancement was eliminated. Now, the court has discretion to strike a prior serious felony in the interest of justice. (§§ 667, 1385 as amended by Stats. 2018, ch. 1013, §§ 1 & 2.)

The parties filed supplemental briefing on the effect of amended sections 667 and 1385 on defendant's case. Both parties agree, as do we, that the new legislation applies retroactively to defendant's case, as the judgment is not yet final. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973, citing *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 307-308 and *In re Estrada* (1965) 63 Cal.2d 740, 744.) The parties disagree, however, on whether remand is necessary.

Respondent contends remand is unnecessary "because the trial court's statements at sentencing clearly indicated that it would not have dismissed the enhancements in any event." Respondent supports this assertion by pointing out that the court denied defendant's *Romero* motion, and in doing so, stated that the victims were particularly vulnerable, it was "a very frightening experience," there were "considerations of public safety" and a "pattern of increasing serious conduct."

We do not view the court's ruling on the *Romero* motion as necessarily indicating the trial court would not have struck the prior serious felony enhancement if it had the discretion to do so.

(See *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110-1111 [trial court's choice of consecutive rather than concurrent sentences was not "a clear indication" that the court would not have struck the firearm enhancement even if it had had the discretion to do so; "speculation about what a trial court might do on remand is not 'clearly indicated' by considering only the original sentence"]; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 ["a remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement"].)

Here, the court referred to "the 667(a)(1), which I have no discretion to strike, which would be a consecutive five years," and when it imposed sentence, stated that under section 667, subdivision (a)(1), "a consecutive five years is added." Nothing in the court's other comments at sentencing tells us what the court would have done if it had the discretion to eliminate the five-year enhancement.

Accordingly, under the new legislation, the case must be remanded to give the court an opportunity to exercise its discretion.

DISPOSITION

The judgment is affirmed. The cause is remanded for the limited purpose of allowing the trial court to exercise its discretion to impose or strike the prior serious felony enhancement and, if appropriate following exercise of that discretion, resentencing defendant accordingly.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J. STRATTON, J.